BRIEF SUPPORTING PETITION FOR WRIT

Robert W. Halliday, sole heir-at-law of Janet M. Halliday, deceased, submits the following brief to support his Petition for a Writ filed herewith in the above entitled case.

The pending case was originally commenced by the petitioner in the Court of Appeals, 8th Judicial District of Ohio, by filing a petition to vacate an order of said Court of Appeals confirming the sale of real property by the Sheriff of Cuyahoga County, Ohio, to The Union Properties, Inc., the plaintiff in foreclosure case No. 166577, on the grounds that there was irregularity in the obtaining of said order in that the appraisers were not disinterested and were not freeholders of Cuyahoga County, and that said purported appraisers did not return an estimate of the real value of the property in money but did return an estimate of value of said property far below its real value in money, and that there was not an appraisement of the property as required by the Laws of the State of Ohio. Specifically Section 11672 of the General Code of Ohio provides:

> "11672. Lands to be appraised.—When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money."

Defendant's Exhibit 1 (R) is a photostatic copy of the return of the appraisers in case No. 16657 and shows that Wm. C. Reed, Robert F. Mooney, and Wm. G. Manoney acted as appraisers of said described premises.

The attorneys for the litigants stipulated as follows:

It is stipulated that the County Recorder if called to testify, would testify that the records of Cuyahoga County, Ohio, disclose that the appraisers William G. Mahoney, Robert F. Mooney, and William C. Reed were not the owners of title record to any real estate in Cuyahoga County in the years 1937, 1938, and 1939.

The testimony of Mark Swisher (R-) shows that the return of the appraisers was not an estimate of the real value of the property in money.

The testimony of Peter V. Shepherd (R-) shows that the return of the appraisers was not an estimate of the real value in money.

Said Petitioner also filed in said Court of Appeals in the pending case a Supplemental Petition to vacate the decree of foreclosure and the order to appraise, advertise and sell the premises, rendered on the 17th day of March, 1938, on the ground that one of the Judges of said Court of Appeals had substantial pecuniary interest in and economic arrangements with The Union Properties, Inc., and its predecessor and at the hearing of said case before the said Court of Appeals on March 2, 1942, it was disclosed that two of the Judges of said Court of Appeals had substantial pecuniary interests in The Union Properties, Inc. To substantiate the above, reference is made to the court reporter's notes taken in Court of Appeals, at the hearing of the pending cause on said March 2, 1942, to-wit:

Mr. Bravo: So much for the appraisers—except that I want to comment upon Thos. Terrell. He is a brother of former Judge Terrell, who sat on this bench.

He stated in his deposition that he did not know whether any members of his family were financially interested in The Union Trust Co. or its successors. Well, the records of that bank, I think, will disclose that the sisters of Judge and Thos. Terrell are holders of creditor's notes against the Union Properties, Inc., in some Three Thousand Dollars or better and Judge Terrell heavily interested.

Judge Lieghley: So you have not overlooked anything—

Mr. Bravo: Well, we want time to take their depositions.

Judge Lieghley: I am a depositor in that bank; so I do not want you to overlook that.

Mr. Bravo: Well, your Honor, I think that revelation comes at a rather late time.

Judge Lieghley: If that is disqualification, neither of the banks could probably get a case tried in Cuyahoga County.

Mr. Bravo: Well, they can always bring a Judge from outside the county unless your Honor revealed his interest by reason of the deposit, and there was an agreement that your Honor sit in this matter.

Judge Lieghley: Just simply a depositor. When they closed the bank I did get my money, a few cents.

Mr. Bravo: Your Honor, for the record I desire to show that Robert W. Halliday objects to your Honor sitting in this case, by reason of the fact that you have just disclosed that you were a depositor in the Union Trust Company an as a holder of creditor's notes in Union Properties, Inc.

Judge Lieghley: Let the record so show. I think I have something around $400 coming yet. Show that, too.

Mr. Bravo: Subject to same objection.

If a Judge has pecuniary interests in the result of the judgment which he renders, such judgment is invalid.

In the case of *Gregory vs. C. C. C. R. R. Co.,* 4 O. S. 675, it was held:

> "Where two judges of the Court of Common Pleas are interested in the event of a proceeding to appropriate land to the use of a railroad and that fact appears of record, and there is no evidence that the land-holder waived his objections to the court, the order of the court, appointing appraisers and directing a warrant, will be revised."

Here Judges were stockholders of the railroad. The appraisers appointed by the court set the value of the land taken and benefited thereby.

In the case of *Tumey vs. State of Ohio,* 273 U. S. Rep. 510-11, the United States Supreme Court held that the interest of a mayor in the result of his decision resulted in an invalid judgment.

In the Tari case, 117 O. S. at page 486, Chief Justice Marshall says:

> "While a State can fix, determine and define the jurisdiction of its courts, it is still open to the United States Supreme Court to determine whether a jurisdiction so exercised operates as a denial of due process of law."

Violation of the due process clause of Amendment XIV of the Constitution of the United States was alleged in the petition originally filed in said Court of Appeals by the petitioner.

Section 6 of Art. IV of the Ohio State Constitution provides that the judgments of the Court of Appeals of the State of Ohio shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of the State of Ohio, and except in cases of which a *Court of Appeals* of Ohio has *Original Jurisdiction.*

In the pending case the petition to vacate the prior action of the Court of Appeals was filed in the Court of Appeals. Original Jurisdiction was assumed by said Court of Appeals. No contention against such *Original Jurisdiction* has been made.

The proir Action of the said Court of Appeals which the Petitioner seeks to vacate consist of

1. A decree in foreclosure and orders to appraise, advertise and sell the described premises rendered on March 17, 1938 by said Court of Appeals;

2. The sale of said described premises by the sheriff of Cuyahoga County pursuant to said orders of March 17, 1938;

3. The order of confirmation of sale by said Court of Appeals issued MARCH 13TH, 1939.

The Supreme Court of Ohio ignored the provisions of Art. IV, Section 6 of the Ohio State Constitution, and denied to your Petitioner the right to a hearing on the merits of the case and affirmed the judgment of said Court of Appeals without a hearing on merit in violation of said Art. IV, Section 6 of the Ohio State Constitution, and in violation of Amendment XIV, Section 1, of the United States Constitution.

JAMES BRAVO, WM. T. ARNOS, R. W. HALLIDAY,
Attorneys for Petitioner,
1245 Leader Building,
Cleveland, Ohio.

STATE OF OHIO,
CUYAHOGA COUNTY, } ss:

ROBERT W. HALLIDAY, being first duly sworn, says: I am the foregoing Petitioner, and that the foregoing Petition is true to my own knowledge.

_____

SWORN to before me this ..... day of August, 1942.

_____

Notary Public.

Office - Supreme Court, U. S.
FILED
OCT 30 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1942.

Nos. 437, 438, 439.

ROBERT W. HALLIDAY,
Petitioner,

vs.

UNION PROPERTIES, INC.,
Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF OHIO.

MEMORANDUM FOR RESPONDENT, UNION PROPERTIES, INC.

EDWIN H. CHANEY,
Union Commerce Building,
Cleveland, Ohio,
Counsel for Respondent,
Union Properties, Inc.

SQUIRE, SANDERS & DEMPSEY,
Union Commerce Building,
Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

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MEMORANDUM FOR RESPONDENT, UNION PROPERTIES, INC.

STATEMENT.[1]

Prior to her death on January 2, 1929, Janet Halliday, mother of petitioner, executed separate mortgages to The Union Trust Company, Cleveland, Ohio, of the properties

[1] Under Ohio practice testimony, exhibits and proceedings in the trial court can become a part of the record only through the filing of a bill of exceptions within the jurisdictional period specified in Section 11564 of the General Code of Ohio (Appendix, p. 10) and the correction, allowance and signing thereof by the trial court as provided in Section 11566 (Appendix, p. 10). In the absence of such a bill of exceptions, the only errors before the reviewing court are errors of law disclosed by the pleadings and orders or judgments in the cause. *Tenesy v. City of Cleveland*, 133 O. S. 251 (1938); *In re Estate of Marion Tyler*, 140 O. S. 333 (1942). Petitioner did not file bills of exceptions within the statutory period and therefore the depositions, exhibits and unauthenticated transcript of proceedings in the Court of Appeals of Cuyahoga County, Ohio, are not and cannot be made a part of its record in these cases. For the purpose of this memorandum, however, the depositions, exhibits and reporters' minutes of part of the proceedings in the Court of Appeals are treated as though they were part of the records in these cases.

described in the petitions for certiorari. On October 2, 1934, the Superintendent of Banks of Ohio brought actions in the Court of Common Pleas of Cuyahoga County on behalf of the Trust Company to foreclose these mortgages. From judgments for the Superintendent, petitioner appealed to the Court of Appeals where he obtained a trial *de novo*. The Court of Appeals entered decrees of foreclosure on March 17, 1938, which adjudicated among other things that title to the properties was in the administrator of the estate of Janet Halliday and that petitioner had no right, title or interest in them. Appraisers were appointed by the sheriff, appraisals were returned, and sales were held at which respondent, successor in interest to The Union Trust Company, was the successful bidder. Respondent filed motions to confirm the sales, and after a hearing the Court of Appeals confirmed two of the sales on January 10, 1939, and the other on March 13, 1939. Subsequently, the properties were conveyed to respondent.

In June, 1941, almost two years after the end of the term at which the orders confirming the sales had been entered, petitioner filed petitions in the Court of Appeals to vacate them. Basis of the positions was his claim that some of the appraisers were not disinterested or freeholders, and did not return an estimate of the real value of the properties, all as required by Section 11672 of the General Code of Ohio (Appendix, p. 11). On February 27, 1941, petitioner filed supplemental petitions seeking vacation of the foreclosure decrees as well as the orders confirming the sales on the ground that Judge Virgil J. Terrell, formerly a member of the court and one of the three judges who concurred in the decrees and orders confirming the sales, was a depositor in The Union Trust Company, the mortgagee, and thus was interested in the outcome of the foreclosure actions. Respondent's answers admitted immaterial allegations, denied the balance, and as affirmative defenses pleaded that petitioner was not a proper

party to maintain the actions and that a prior decree quieting title in respondent was *res adjudicata.*

A hearing was held in the Court of Appeals on March 2, 1942. Petitioner asserted that Judge Terrell and certain members of his family had been depositors in The Union Trust Company and that he wanted time to take their depositions. This request was refused. Petitioner did not offer any evidence concerning the alleged interest of Judge Terrell.

At this point in the hearing Judge P. L. A. Lieghley, one of three judges hearing the case, disclosed that he had been a depositor in The Union Trust Company. Petitioner's counsel then stated that he wanted the record to show that petitioner objected to Judge Lieghley participating in the case. Neither then nor later did petitioner, who is an attorney, or his counsel, file an affidavit of bias and prejudice as provided in Section 1527 of the General Code of Ohio (Appendix, p. 11) or request time to file such an affidavit. No application was made either then or later for leave to amend the pleadings in order to assert the interest of Judge Lieghley at the time of the earlier hearings as a ground for vacating the foreclosure decrees or orders confirming the sales.

On March 16, 1942, the Court of Appeals entered an order dismissing the petitions and supplemental petitions. The court did not write an opinion. Petitioner filed notices of appeal to the Supreme Court of Ohio, which sought to invoke its jurisdiction on two grounds: (1) that the cases involved constitutional questions; and (2) that the cases were of public and great general interest. To sustain the second ground, petitioner filed motions for orders requiring the Court of Appeals to certify its records. The notices of appeal did not seek to invoke the jurisdiction of the Supreme Court on the ground that the cases originated in the Court of Appeals.

In his motions for orders requiring the Court of Appeals to certify its records, petitioner assigned several errors. The fourth assignment alleged in general terms that petitioner was deprived of his property without due process of law in violation of the Constitutions of Ohio and the United States. This assignment did not specify whether the orders of the Court of Appeals constituted a denial of due process by reason of the alleged disqualification of the appraisers, the alleged interest of Judge Terrell or the refusal of the court to grant a continuance to permit petitioner to take depositions concerning it, or the participation of Judge Lieghley in the hearing after his disclosure that he had been a depositor in The Union Trust Company. The motions to certify were the first pleadings in which petitioner asserted the alleged denial of due process. On June 3, 1942, the Supreme Court of Ohio entered orders overruling the motions to certify and dismissing the appeals. The latter orders stated that the appeals were "dismissed, *sua sponte* (no debatable constitutional questions involved)". The court did not write an opinion.

Petitioner filed applications for rehearing which asserted that the cases had originated in the Court of Appeals and that the Supreme Court of Ohio was therefore required by Article IV, Section 2 of the Constitution of Ohio (Appendix, p. 10) to assume jurisdiction. Respondent conceded that the cases had originated in the Court of Appeals but opposed the applications because the notices of appeals had not specified that petitioner invoked jurisdiction of the Supreme Court on this ground, as required by Rule II, Section 1 of the Rules of Practice of the Supreme Court of Ohio (Appendix, p. 10). The applications were denied on July 1, 1942.

ARGUMENT.

I.

The petitions for writs of certiorari should be denied because petitioner did not exhaust his remedies for review by the Supreme Court of Ohio. *Matthews v. Huwe*, 269 U. S. 262 (1925); *McMasters v. Gould*, 276 U. S. 284 (1928); *Southern Electric Co. v. Stoddard*, 269 U. S. 186 (1925).

Article IV, Section 2 of the Constitution of Ohio (Appendix, p. 10) afforded petitioner three modes of invoking the jurisdiction of the Supreme Court of Ohio: (1) by motions for orders requiring the Court of Appeals to certify its records on the ground that the cases were of public and great general interest; (2) by appeals of right on the ground that the cases involved constitutional questions; and (3) by appeals of right on the ground that the cases originated in the Court of Appeals. The first mode of appeal is addressed to the discretion of the court. The second mode of appeal involves a preliminary hearing, as to the debatability of the constitutional questions, prior to a full hearing of all questions in the case. The third mode of appeal involves a full hearing of all questions in the case without a preliminary determination that the case is of public or great general interest or involves constitutional questions.

Rule II, Section 1 of the Rules of Practice of the Supreme Court of Ohio required the petitioner to state expressly in his notices of appeals the mode or modes of invoking the jurisdiction on which he relied. The notices of appeals specified the first two modes of invoking jurisdiction but did not specify the third. Petitioner states (Petitions, p. 10) and no one disputes that the cases originated in the Court of Appeals within the meaning of Article IV, Section 2 of the Constitution of Ohio. Petitioner invoked the jurisdiction of the Supreme Court on this ground for the first time in his applications for rehearings. Respondent did not deny that the cases originated in the Court of Appeals, but denied that petitioner had in-

voked jurisdiction on this ground within the time and in the manner required by Rule II, Section 1. Denial of the applications for rehearing sustained the position of respondent. It follows that the petitions for writs of certiorari should be denied because petitioner did not exhaust his remedies for review by the state court.

II.

The claims that some of the appraisers were not disinterested, were not freeholders of the county and did not actually view the properties involve questions of local law —the proper construction of Section 11672 of the General Code of Ohio. The same is true of petitioner's contention that the Supreme Court of Ohio misconstrued Article IV, Section 6 of the Constitution of Ohio relating to jurisdiction in cases originating in courts of appeals. *Standard Oil Co. v. Missouri,* 224 U. S. 270, 281 (1912).

III.

The orders entered by the Court of Appeals and by the Supreme Court of Ohio are silent as to the bases of the courts' judgments. There is nothing to indicate that the Supreme Court ruled or intended to rule upon the claim of petitioner that the judgments of the Court of Appeals deprived him of due process in violation of the Fourteenth Amendment to the Constitution of the United States. See *Lynch v. New York ex rel. Pierson,* 293 U. S. 52 (1934). There are several adequate and independent non-federal grounds for the judgments of the Supreme Court with respect to the alleged interest of Judge Terrell and Judge Lieghley.

The allegation that Judge Terrell had a substantial interest was denied in respondent's answer and presented a question of fact concerning which petitioner did not offer any evidence. His request at the hearing for a continuance to take depositions was necessarily addressed to the discretion of the Court of Appeals. *Norton v. Norton,* 111

O. S. 262, 266 (1924); *Diebold v. Powell,* 32 O. S. 173, 175 (1877); see *Franklin v. South Carolina,* 218 U. S. 161, 169 (1910). Its ruling refusing the request was unquestionably correct. The cases had been specially assigned for hearing, and at least two months before the hearing petitioner had interrogated the witness, Thomas L. Terrell, concerning the alleged interest of Judge Terrell. (No. 437, Depositions, pp. 1, 16.) In addition, the facts concerning the claims of depositors of The Union Trust Company had been on file in the liquidation proceedings for almost nine years.

The claim based on the fact that Judge Lieghley, who concurred with Judge Skeel and Judge Morgan in the judgments in these cases, had been a depositor in The Union Trust Company, was also properly determined on nonfederal grounds. Petitioner never moved to amend his supplemental petitions to assert the existence of Judge Lieghley's status as a depositor in the Trust Company at the time of the earlier hearings as a ground for vacating the foreclosure decrees and orders confirming the sales. He never invoked or attempted to invoke the procedure provided in Section 1527 (Appendix, p. 11) of the General Code of Ohio and prescribed in Article IV, Section 6 of the Constitution of Ohio (Appendix, p. 11) for determining the alleged disqualification of judges of courts of appeals. Furthermore, there is nothing in the record to show that the asserted interest of Judge Lieghley was direct and substantial.[2] *Tumey v. Ohio,* 273 U. S. 510, 523 (1927).

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[2] Petitioner has not seen fit to file in this Court one of his own exhibits which would demonstrate that, conceding the extravagant and contradicted claims of petitioner as to the values of the properties, the maximum interest of Judge Lieghley could not conceivably have amounted to the sum of Five Dollars. The ratio of his deposit to the total liabilities of The Union Trust Company and the profit ultimately derived from the sale of the properties might materially reduce his interest. The depositions disclose that all of the properties would have been transferred to purchasers without substantial profit but for the institution of the quiet title actions and the proceedings to vacate the orders confirming the sales.

IV.

In addition to the grounds stated above, there are at least four other non-federal grounds adequate to support the judgments of the court below. The proceedings to vacate the judgments and orders after term were filed under favor of Section 11631(3) of the General Code of Ohio (Appendix, p. 12) and were required by Section 11640 (Appendix, p. 12) to be commenced within three years after the judgments were rendered and the orders were made. The foreclosure decrees were rendered on March 17, 1938 and the proceedings to attack them were not commenced until June, 1941. Moreover, Section 11637 (Appendix, p. 12) explicitly prohibited vacation of the foreclosure decrees and orders confirming the sales unless it was adjudged that petitioner had a valid defense to the foreclosure actions and the motions to confirm the sales. Petitioner did not plead or offer evidence of any defense, real or imaginary, to the foreclosure actions. The depositions which he has filed in this Court contained conflicting evidence from which the state courts could properly have concluded that petitioner had no defense to the motions to confirm the sales.

Respondent specially pleaded that petitioner was not a proper party to maintain the proceedings to vacate. In support of its plea respondent introduced in evidence in the Court of Appeals certified copies of the decrees of foreclosure in which the court had adjudicated that title to the properties was vested in the administrator of the estate of Janet Halliday and that petitioner had no right, title or interest in them. Respondent also specially pleaded that the decree in an action to quiet title was *res adjudicata* of the issues involved in the proceedings to vacate. In support of this plea, respondent introduced in evidence a certified transcript of the pleadings and the judgment of the Court of Common Pleas, which had been affirmed on appeal and had been entered after the orders confirming

the sales in the foreclosure actions. This judgment had quieted title of respondent in the properties against petitioner. Petitioner has not filed these exhibits in this Court and for the reasons stated in footnote 1 above they are not and cannot be made a part of the record in these cases. The fact remains, however, that the special pleas and the evidence supporting them constituted additional non-federal grounds adequate to support the judgments of the court below.

CONCLUSION.

Accordingly, the petitions for writs of certiorari should be denied.

Respectfully submitted,

EDWIN H. CHANEY,
Counsel for Respondent,
Union Properties, Inc.

SQUIRE, SANDERS & DEMPSEY,
Of Counsel.